IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

SA.No. 564 of 2001()

AS.35/1998 of PRINCIPAL SUB COURT, KOCHI
OS.594/1996 of ADDL.MUNSIFF COURT,KOCHI

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APPELLANT/APPELLANT IN A.S. 35/98:

K.X. JOSEPH, S/O. LATE SRI. XAVIER,
15/1573, KURISINGAL, RAMESWARAM VILLAGE,
MOOLAMKUZHI MURI, KOCHI TALUK.

BY ADVS. SRI.T.A.NARAYANAN NAIR
SRI.SHIVSHANKAR RAO

RESPONDENTS/RESPONDENTS IN A.S.35/98/PLAINTIFF & DEFENDANT IN O.S. 594/1996:

1.KARMALI @ BABY, AGED 43 YEARS,
D/O. AUGUSTINE, C/O. KRISHNANKUTTY @ KUNJUMON,
RESIDING AT 15/1162, VELIPARAMBIL HOUSE,
STATUE ROAD, NAZARETH, KOCHI - 2.

2.T.H. SADIQUE, S/O. HASSAN, PAINGAMADAPARAMBIL,
PANAYAMPILLY, KOCHI - 2

BY ADV. SRI.S.K.BRAHMANANDAN)
SRI.G.SREENIVASA PRABHU) -R1
SRI.S.B.PREMACHANDRA PRABHU)

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 15/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN C.M.P. NO. 1264 OF 2001 IN S.A. NO. 564 OF 2001.

DISMISSED

15.10.2007 Sd/-(M.SASIDHARAN NAMBIAR, JUDGE)

sp/

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 564 OF 2001

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Dated this the 15th day of October, 2007

JUDGMENT

This appeal was filed challenging the dismissal of A.S.35/1998 by Sub Judge, Kochi. That appeal was filed by appellant as a third party challenging the decree obtained by first respondent against second respondent. Appellant and first respondent were husband and wife. Their marital relationship got strained and subsequently they divorced. In that wedlock, a child was born. Father of the appellant executed a gift deed in favour of the son of appellant and first respondent, while he was a minor. Subsequently after attaining majority the son executed a settlement deed in favour of first respondent mother. It is on the basis of that settlement deed, first respondent instituted O.S.594/1996 before Munsiff Court, Kochi seeking a decree for recovery possession of the property from second respondent. Second respondent remained

absent and an ex parte decree was passed by the trial court. It was challenged by filing a first appeal by appellant, a third party. First appellate court dismissed the appeal reserving the right of appellant to agitate his case in a separate suit. It is challenged in this appeal.

2. Appeal was admitted formulating the following substantial questions of law.

1. Whether decree and judgment in O.S.594/1996 is not adversely affecting the right and title of appellant over the plaint schedule property especially when M.F.A.1246/1996 is pending consideration of this court, in respect of the same property based on the same document.

2. Whether appeal can be filed by appellant as a third party against the decree and judgment in a suit challenging the same, if it will adversely affect the appellant.

3. On the facts and under the circumstance of the case whether dismissal of the appeal without considering on merit is illegal.

4. Learned counsel appearing for appellant and first respondent were heard.

5. M.F.A.1246/1996 was filed by appellant herein challenging the decision of Family Court in O.S.9/1995, which was a suit instituted by appellant for declaration of title in respect of the property covered in O.S.594/1996. The case of appellant was that the gift deed executed by the son in favour of first respondent is null and void. The Family Court rejecting the case of appellant dismissed the suit. M.F.A. 1246/1996 was filed challenging the said judgment. Though M.F.A. was pending when the appeal was admitted, it is admitted at the bar that subsequently M.F.A. was dismissed by this court and Civil Appeal No.6608/2005 filed by appellant challenging the decision of this court in M.F.A.1246/1996 was also dismissed. In such circumstance, when appellant himself admitted in the appeal memorandum that decision in O.S.594/1996 will adversely affect his interest in M.F.A.1246/1996, appellant cannot be

heard to contend that the decision in MFA will not be binding on him. Learned counsel for appellant submitted that contending that Family Court has no jurisdiction to try the said suit, he had filed a separate suit which is now pending before Munsiff Court, Kochi. It is not necessary to consider the merit of that suit in the present appeal. In such circumstance, in the light of the decision in M.F.A.1246/1996, which has become final, appellant is not entitled to challenge the decree in O.S.594/1996. Appeal is dismissed. In view of the dismissal of M.F.A, I do not find any reason to interfere with the finding of first appellate court that appellant is not entitled to challenge the decree in the first appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.564 /2001

JUDGMENT

15TH OCTOBER,2007